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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

REPLY BRIEF OF PETITIONERS.

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MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

DISCUSSION OF POINTS MADE BY RESPONDENTS.

Separate briefs have been filed on behalf of the casualty company and its co-respondents. The matters therein may, however, be conveniently discussed under the captions adopted by the respondent casualty company from the brief of petitioners. The points made by the respondents other than the casualty company, viz.,

1. That the United States District Court had authority to vacate the decree of the County Court because the same was obtained by fraud.

2. That a cross-petitioner or intervener may obtain the same relief as they could if they were original petitioners.

3. That the judgment of the County Court declaring the estate of Legette D. Kelleam to be ancestral is void,

insofar as material to the issues before this court, will be considered under the appropriate and related captions adopted by petitioners and the casualty company.

Preliminarily, however, it is desired to emphasize that the issues before this court involve primarily questions of jurisdiction of the trial court as to (a) the subject matter, (b) the parties, and (c) to grant the particular relief sought by the bill and cross-bill and awarded by the decree.

Insofar as the prior proceedings in the state court are concerned, the issue here is not whether the judgments of that court were correct or incorrect, but rather whether that court had jurisdiction to determine and did determine the questions there presented. Fraud, if it existed, could have been the objective of remedial action in the County Court and that court's decision as effectively precluded the parties both as to the facts and the law as could the subsequent judgment of the federal court.

RESPONDENTS DO NOT CONSIDER SECOND JUDGMENT OF COUNTY COURT.

Much comment is incorporated in both answer briefs upon the alleged fraud of the petitioners in obtaining the *first* judgment of the probate court. Both briefs are eloquently silent regarding the *second* judgment of the County Court which determined every issue thereafter

submitted to the national court including the issue of fraud and the validity of the first decree of the County Court. Those issues became *res adjudicata* with the entry of the second judgment, and whether right or wrong as to the law the rule of *stare decisis* and of the law of the case precludes a re-examination of the questions thereby determined except upon appeal timely noted and prosecuted with due diligence. The rule is settled by the local law and practice. *Rose* v. *Oklahoma City,* 182 Okl. 422, 78 Pac. (2) 315.

The nearest approach to a consideration of the force and effect of the *second* judgment of the probate court, and the effect of the pendency of an appeal in the state tribunals from that judgment appears at page 17 of the surety's brief where it is suggested, argumentatively, that the surety appeared specially in the County Court in an effort to quash process of some sort. This is clearly without the record but also met squarely by the observation that if in proceedings against it in the County Court, process was not sufficient to invest jurisdiction in the court to render in any event judgment binding the surety, this circumstance constitutes an additional ground upon which it could claim immunity from any subsequent liability. For if this be true, it was exonerated not only by the two favorable judgments for its principal, but also by the further circumstance that process obtained was insufficient to render it subject to the mandate of the court even in event of a reversal of the judgment as to the principal upon appeal. The contention emphasizes the insubstantial nature of its claim to "exoneration" in the federal court; for from it the surety had been at the date of the decree complained of exonerated not twice but three times viz., (1) by the original judgment of the County

Court expressly exonerating both principal and surety, (2) by the judgment holding service against the surety inadequate to confer upon the County Court jurisdiction to assess liability against it in the second proceeding, even though its principal might be bound, and (3) by the second judgment of the County Court exonerating the principal which of necessity also discharged the surety. The surety could not even be harmed by a reversal as to the principal on appeal if it had not been served properly and had made a special appearance to challenge jurisdiction which was proper.

All of which but further emphasizes the curious reluctance of the surety to be exonerated, and lends support to the petitioners' contention, otherwise well supported by the record that the institution of this litigation in the federal court, and the summary appointment of a receiver to take charge of the estate without notice to the respondents to whom it had been judicially determined it belonged was in furtherance of a collusive arrangement between agents of the surety and its co-respondents to take the cause in the federal court and thereby circumvent the jurisdiction and authority of the state tribunals in the case then pending upon appeal; and in the hope that there a different view of local law might be applied.

At page 3 the respondents, other than the casualty company, also go without the record to recite that an order was made staying all proceedings in the state court pending outcome of this action, and then counsel volunteer to furnish a certified copy of this order of the appellate court if desired at the time of argument. It is not clear how observance of an amenity of this character by the state tribunal to await determination of this controversy finally in the national courts before proceeding further

can enlarge or diminish the initial jurisdiction of the District Court for the Northern District, which jurisdiction either existed or was absent regardless of any subsequent order or proceedings in the state court. Why emphasis is placed on this occurrence if it be true is not at all clear.

Frequent repetition in both answer briefs of the terms "fraud" and "fraudulent" to buttress argument and authorities involving jurisdiction of the national courts provokes the observation that the issue here is not whether the judgment of the state court was obtained by fraud, but whether the federal court in the proceeding by the casualty company and upon the cross-petition of the cross-petitioners had jurisdiction initially and if so exceeded its power by the decree. In fairness to the petitioners here, however, it should be noted that, perhaps fortunately, no court has ever held that contrary contentions regarding either facts or law by opposing litigants constitute fraud; and if any court should so hold application to that rule to the parties at bar here would unquestionably produce embarrassing results for either one of them or the other.

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

Respondents make no objection to this proposition and do not quarrel with any of the authorities cited by petitioners to sustain it. The effort made is to escape application of the principle to the facts. The surety asserts at page 15 that:

> "* * * this kind of a proceeding does not disturb the possession of the property by the said court."

It cites *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. ed. 80; *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 619, 56 S. Ct. 600, 80 L. ed. 920; *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U. S. 456, 59 S. Ct. 275, 281, 83 L. ed. 285. Examination of those cases will show (1) that none of them relate to the constitutional and statutory authority of the County Court of Oklahoma in probate matters and (2) that only the first case involves a probate proceeding. That case, *Waterman* v. *Canal-Louisiana Bank & Trust Co., supra*, did not arise under facts even approximately similar to those here for therein Frances E. Waterman, a resident of Chicago, Illinois, joined by her husband, also a citizen of Illinois, brought suit in the United States Circuit Court against the Canal-Louisiana Bank & Trust Company executor of the last will and testament of Caroline Stannard Tilton, a citizen of the State of Louisiana and an inhabitant of the Eastern District of that state and others to recover a legacy. The court expressly recognizes that a proper diversity of citizenship is indispensable to federal jurisdiction. The case expressly determines that:

> "The courts of the United States, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court."

citing *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 S. Ct. 906. In the case at bar jurisdiction of the federal court is bottomed upon a contention of respondents that suit is *in rem*, of a local nature, and that the federal court acquired jurisdiction by appointment of a receiver for the property.

The *Waterman* case says further, referring to *Farrell* v. *O'Brien,* 199 U. S. 89, 50 L. ed. 101, 25 S. Ct. 727:

> "That case recognized what previous cases had held—that, in proceedings purely of a probate character, there was no jurisdiction in the federal courts. This was in harmony with the rule theretofore laid down in *Byers* v. *McCauley, supra,* in which it was held that the federal court could not exercise original jurisdiction to draw to itself the entire settlement of the estate of the decedent and the accounts of administration, or the power to determine all claims against the estate. But it was there decided that a circuit court of the United States could entertain jurisdiction in favor of citizens of other states, to determine and award by decrees binding *in personam* their shares in the estates."

From the quoted portions, it is obvious decrees by federal courts in proceedings of the nature under consideration are considered *in personam,* which is precisely the contention of petitioners and of necessity emphasizes want of jurisdiction herein, for if the case be *in personam,* personal service upon respondents in the district or their voluntary appearance was indispensable as authorities heretofore cited clearly establish.

Commonwealth Trust Company v. *Bradford, supra,* upon which the surety relies, was a controversy between a trustee appointed by a state court and the receiver of a bank for an adjudication of the bank's interest in certain assets. This court say:

> "The trust here involved was created by the bank's voluntary action, not by the Orphans' Court. Whatever control the latter possessed resulted solely from appointment of the successor trustee and, for present purposes, did not materially differ from that exercised by probate courts over such fiduciaries as

> guardians, administrators, executors, etc. * * * Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. * * * only a judgment *in personam* was rendered."

Here again this court recognized proceedings of the character here to be *in personam* and not local.

The next case relied upon by respondents, *Princess Lida of Thurn and Taxis* v. *Andrew A. Thompson, et al.,* trustees, recites that (Headnote 3):

> "Where the judgment sought in a suit in a state court and in a suit brought in a federal court on the same cause of action is strictly *in personam,* both courts, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other."

And, Headnote 4:

> "If a suit instituted in a state court and a suit brought in a federal court on the same cause of action are *in rem* or *quasi in rem,* so that the court or its officer has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the court in which suit was first instituted is exclusive."

And further, Headnote 5:

> "The principle that the state or federal court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer

trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property."

The latter decision is by Mr. Justice Roberts. It was determined that:

"The common pleas court could not effectively exercise the jurisdiction vested in it, without a substantial measure of control of the trust funds. Its proceedings are, as the court below held, *quasi in rem*, and the jurisdiction acquired upon the filing of the trustees' account is exclusive. The District Court for the Western District of Pennsylvania is without jurisdiction of the suit subsequently brought for the same relief, and the petitioners were properly enjoined from further proceeding in that court."

Hewitt v. *Hewitt, et al.*, 17 F. (2d) 716, is also cited and relied upon under this caption. That case recognizes that the right of a federal court of equity to give relief against a judgment of the state court obtained by fraud is limited to cases *where diversity of citizenship exists.* The case did not involve a situation where the state court rendering a decree, in a direct attack upon the decree in that court, had expressly adjudicated the identical matter subsequently presented for determination by the federal court. *Marshall* v. *Holmes*, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870, which is also cited, merely announces the unquestioned rule that federal circuit courts of equity have jurisdiction to restrain for fraud the execution of judgments obtained in the state court where diversity of citizenship gives jurisdiction over the parties. This is but the exercise of an equity power likewise possessed by the state courts of chancery. But here the effort was not to restrain (which would be clearly a personal action and not maintainable against defendants where not served), but for other purposes, and there was no diversity of citizenship between the real parties in interest.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties.

The effort to show a limited appearance in the County Court by the surety mentioned under this head has previously been discussed (*supra*, p. 3 *ff.*).

Counsel also quote extensively from the Oklahoma statutes governing probate procedure, Title 58, O. S. A., Sections 127, 128, 130 and 162, under this head. The discussion is obviously in reply to a contention of petitioners under the succeeding caption rather than under this head, and will be discussed under the appropriate head (Par. III *ff.*).

Petitioners' contention that decrees of the County Court bind alike the surety and the administrator so that its judgment constituted as effective an exoneration as could be had elsewhere appears not denied. Upon the issue of collateral and direct attacks the surety respondent, ignoring the Oklahoma cases cited by petitioners, cites *Charlotte Weyant, et al., Respt.* v. *Utah S. & T. Co., Appt.*, 182 P. 189; 9 A. L. R. 1119 and 9 A. L. R., page 1123. The questions are amply covered by local law and decisions of the Oklahoma Supreme Court and the rule elsewhere if it varies, which is not conceded, is of no moment and in the interest of brevity will therefore not be analyzed.

III. The judgment of the County Court refusing to vacate the decree was in conformity to local law.

Counsel concede that so far as the mechanics and procedure followed in the probate court were concerned, the local law was followed; also that E. A. Kelleam was entitled to appointment as administrator, and that he had

a preferential right to appointment. Previously in their brief, at page 17, extensive citations from Title 58, O. S. A. are inserted, as noted above, the quotations being from Sections 127, 128, 130 and 162 of the code governing administration of estates, and the observation is made that from the above cited statutes *it is a fixed policy of the law that before administrators shall be appointed notice must be mailed personally to all heirs at law.* Wholly deleted from the quotation of Section 128, entitled "Notice of Hearing," is the following material proviso:

> "Provided, that if the petition asks for the appointment of some person entitled under the law to appointment, and there shall accompany such petition a waiver of all persons having a prior right to appointment, then no notice shall be given, and the court shall proceed without delay to hear such petition."

It was under this omitted proviso that E. A. Kelleam as the only surviving brother was entitled to appointment *forthwith and without notice* as determined in the cases cited by petitioners under this head in their brief.

The remaining discussion under point 3 by the respondents attempts to explain away the undisputed evidence before the trial court that:

> "My sister heard that the estate had been administered and told me. That was two years ago last October."

Concerning this statement counsel say:

> "This can serve only one purpose in the world and that is to show that one of these heirs knew of the existence of the probate proceedings in time to have come into the county court."

The testimony not only shows that one but that at least two of the respondents knew of the probate proceedings in time to have asserted their rights by timely appearance or by appeal. The statement is nowhere denied; neither is there anywhere in the testimony evidence that all the petitioners had not like information, by reason of which they were precluded by laches and delay from an attack on the judgment under the plain provisions of the state law.

The respondents, other than the surety, say that "*no complaint is made * * * of the appointment of E. A. Kelleam as administrator;*" but they do complain that he was a non-resident at the time of his appointment and did not appoint a service agent. How this, if true, could have in any way affected their rights is not clear. The appointment of a service agent is merely directory and not jurisdictional. *Southwick* v. *Jones,* 177 Okl. 409, 60 P. (2d) 774. Moreover the record does not support the statement that at the time he was appointed administrator the respondent E. A. Kelleam was not then a resident of Drumright, Creek County, Oklahoma.

IV. It was the duty of the federal court to sustain the plea of the surety to dismiss the bill of the surety for want of jurisdiction at the trial.

(a) Because the action, if any existed, was *ex contractu* and the court had no jurisdiction of the parties to the bond.

(b) The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court.

(c) The U. S. District Court of the Northern District had no venue of the parties.

(d) The suit was not a local action under 28 U. S. C. A., Secs. 116-118.

(e) The bill stated no cause of action within either the legal or equitable jurisdiction of the court.

Counsel assert that they will answer all of the issues raised by sub-paragraphs a, b, c, and d (*supra*) under one head, but an analysis of their reply brief will show propositions a, b, and c nowhere discussed or considered. Neither are these propositions answered by the surety's co-respondents. The surety argues that Sections 116 to 118, Title 28, U. S. C. A., are controlling, but depends upon the decision of the Circuit Court herein complained of alone for support and the entire matter is dismissed with the observation:

> "Our law suit must stand or fall on this proposition. That is—that this was an action to impress a trust upon real and personal property located and having a fixed situs in the northern and western districts of Oklahoma."

Previously in their brief at page 12 the surety company assure the court:

> "This is an action brought by the surety on the administrator's bond in the nature of a suit in exoneration and to impress a lien upon the property involved."

The surety's co-respondents assert (their br. p. 4) that the case grows out of the surety's

> "* * * own peculiar rights as surety to seek protection of the Federal District Court and the case further gives the right to the cross-petitioners, who were made defendants by the plaintiff, Maryland Casualty Company, to have their rights adjudicated

in and to any funds or property over which the court acquired jurisdiction by reason of the original action."

In view of these somewhat abstruse statements and the equally conflicting statements regarding the nature of the action by the Circuit Court, the difficulty of classifying this somewhat unusual type of case becomes more readily apparent. Elsewhere the action is referred to by inference as a bill *quia timet* by the surety and the following cases from other jurisdictions supporting the right to maintain such an action are cited: *Morley Construction Co., et al.* v. *Maryland Casualty Company,* 90 F. (2d) 976, and *Glade County, Fla.* v. *Detroit Fidelity & Surety Co.,* 57 F. (2d) 449.

Although no mention is made of petitioners' contention that:

> *"The bill stated no cause of action within either the legal or equitable jurisdiction of the court,"*

(sub-para. E, *supra*), counsel for the surety make reference to the provisions of 12 O. S. A. 1108 (R. L. 1910, Sec. 5308) discussed under this head by petitioners. They omit wholly any discussion or consideration of the qualifying provisions of the section expressly limiting the right of the surety to file suit before the liability is due (in the nature of a bill *quia timet*) to situations as:

> *"Whenever any of the grounds exist, upon which, by the provisions of this code, an order may be made for arrest and bail or for an attachment."*

These restrictive provisions are as much part of the statute as those preceding, and they clearly preclude maintenance of a suit of this character under the circum-

stances admittedly existing by the surety *in either a state or federal court,* as clearly shown in petitioners' original brief (pp. 49 *ff.*). Since the matter is governed by the express provisions of the statutes in Oklahoma no purpose can be served by consideration of the cases from other jurisdictions and under other circumstances which counsel cite at page 28. *Walton* v. *Williams,* 5 Okl. 642, 49 P. 1022, the only Oklahoma case cited involved a suit on a brewery employee's bond and not any set of facts such as are now before the court. The case specifically recites that:

> "* * * the petition set forth facts which would authorize an order of attachment" (l. c. 646).

And an attachment was issued (l. c. 645). In it the prayer was that the defendants be ordered and adjudged to indemnify the plaintiffs—clearly an action for relief *in personam,* and that, if defendants failed to indemnify as ordered, plaintiffs be awarded judgment for the amount of their liability as sureties. The case therefore does not, as asserted, establish that a surety has an equitable lien upon the property of his principal, nor that an action for indemnity is a local action, nor that a surety has an action for indemnity before the debt has been paid under all circumstances where he may fear a loss.

The danger of sanctioning the rule contended for will be appreciated if it be remembered as heretofore noted that under it a surety, having undertaken for hire to assume a risk, could at will take over the property of his principal and supplant the administrator and the court through intervention of a chancery court. This would defeat the very object and purpose of the surety bond in the first instance, and impede the functioning of the probate tribunal.

V. It was the duty of the court to sustain motion to dismiss both the bill and the cross-petition at the trial for want of jurisdiction.

(a) The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done.

(b) There was no complete diversity of citizenship between the real parties in interest as required by 28 U. S. C. A. 111-112.

(c) The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

Under this head, without considering any of the specific propositions advanced by petitioners separately, the surety argues that the interest of the cross-petitioners was adverse to the interest of the Maryland Casualty Company, and that there was no common interest between them, therefore, that there was no occasion for a realignment of the parties. It is petitioners' view that in any suit involving liability of the administrator upon his bond, the administrator and the surety must of necessity be aligned against the cross-petitioners; that in such suit the administrator as such is an indispensable party; that the real controversy was between contending claimants to an interest in the estate and that the court's jurisdiction to grant relief upon the cross-petition was limited to controversies between claimants where a diversity of citizenship existed and the parties were within the court's jurisdiction. Particularly is this true when it is noted that the real hub of the conflict among all of the parties revolves about two judgments of the County Court, to which all were parties. This judgment could not be set aside as to part without affecting the interests of all. All were indispensable parties to an action involving its validity.

No reference is made in the briefs to the failure to prove citizenship or residence of Kelleam Hall nor to the uncertainty and conflict between allegations of "residence" and "citizenship" and "address" in the petition, the evidence, and the decree, all of which are in hopeless confusion. It is suggested that in the County Court E. A. Kelleam when appointed administrator stated that his address was Drumright, Oklahoma. Of course reference is to his address at the time he was appointed administrator in 1936, not to his citizenship or residence some years later, when the plaintiff in this action filed suit asserting him then to be a resident and citizen of Arizona, which was not then denied.

The surety further argues that it is a well settled rule of law that proof of residence is *prima facie* evidence of citizenship where no issue upon that fact is made. Of course in the case at bar there was a very definite issue upon this matter and, as the cases heretofore cited clearly show, the burden of proof was upon the person asserting federal jurisdiction which burden was not discharged.

A moment's reflection will reveal the dangers from a relaxation of the established rule that federal jurisdiction where dependent on the divergent citizenship of litigants must be tested strictly by *citizenship*, and not by such loose expressions as where the litigant "lives," "resides" or has his "address." For obviously wherever a citizen is he lives; residence may be temporary, and most any desired place can at will or caprice become one's "address." And if the *citizenship* test is not observed with some rigidity, the federal tribunals will be swamped with litigation contrary to the intent and purpose of the basic law and the public policy therein expressed.

At page 29 of its brief, the surety company asserts that no personal judgment was rendered or attempted to be rendered below. Petitioners do not so construe the decree. Reference to its terms will show that in the face of affirmative and undisputed evidence showing all matters at issue had been previously adjudicated by the County Court, and that the cause was then pending on appeal in the state courts, the federal court attempted to redetermine every question both of fact and of law previously decided in the County Court. Regarding its provisions, the decree speaks.

Conclusion.

This case presents clearly a situation where, following a decision by a state court of competent jurisdiction and while the cause is pending on appeal in the state court, litigants finding the going rough and conceiving that they would perhaps fare better in the federal courts, collusively institute suit there and attempt to circumvent established limitations upon the jurisdiction of the national courts and to impede and thwart the orderly progress of the case through the established and customary channels. It evidences such a wide divergence from the usual judicial procedure, such evident disregard of the limitations upon the jurisdiction of the federal courts and such definite and unwarranted imposition upon the prior authority of state courts of at least co-ordinate and concurrent jurisdiction and disregard of their mandates, as to warrant intervention of this court to avoid unseemly conflict and confusion.

It is therefore respectfully submitted that the decree complained of should be reversed and the petitioners restored to all rights denied them by virtue of this proceeding, including costs necessarily incurred as the result of it.

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